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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re E.J., a Person Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

Jessica R., et al.,

Defendants and Appellants.

D074778

(Super. Ct. No. NJ15334)

APPEALS from findings and orders of the Superior Court of San Diego County,
Michael J. Imhoff, Commissioner. Affirmed.

Elizabeth C. Alexander, under appointment by the Court of Appeal, for Defendant
and Appellant, Jessica R.

William D. Caldwell, under appointment by the Court of Appeal, for Defendant
and Appellant, Larry J.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County Counsel, and Patrice Plattner-Grainger, Deputy County Counsel, for Plaintiff and Respondent.

Jessica R. and Larry J. appeal orders terminating parental rights to their son, E.J., under Welfare and Institutions Code section 366.26¹ and denying their petitions for modification under section 388. Jessica contends the juvenile court erred when it denied her petition to return E.J. to her custody, found that the beneficial parent/child relationship exception did not apply, and terminated parental rights. Larry challenges the denial of his petition for an additional period of reunification services.

We conclude that Jessica and Larry do not meet their burden on appeal to show the juvenile court abused its discretion in denying their section 388 petitions. The record also supports the juvenile court's finding that termination of parental rights would not be seriously detrimental to E.J. because the benefits of adoption outweighed the benefits of continuing the parent/child relationship to him. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Jessica R. and Larry J. are the parents of E.J., who is now three years old. In July 2017, the San Diego County Health and Human Services Agency (Agency) filed a petition under section 300, subdivision (b), alleging 16-month-old E.J. had suffered, or was at risk of suffering, serious physical harm or illness as a result of violence in the home. The Agency alleged Larry choked Jessica, causing her to lose consciousness, and struck her with an object, injuring her face. He also threw mouthwash into her eyes and

¹ Further unspecified statutory references are to the Welfare and Institutions Code.

face, resulting in redness and swelling in the eyes and surrounding area. Shortly before that incident, Larry had placed his hand over E.J.'s mouth until the child stopped crying and passed out. Jessica was unwilling to recognize the risks to the child from domestic violence and maltreatment.

On July 20, 2017, Jessica told her sister, grandmother, and two police officers that Larry had spent all morning choking and hitting her because she had caught him cheating. He also poured Listerine on her head. Officers reported that Jessica was visibly upset and had a bruise under her left eyebrow. Her eyes were red and swollen, and she smelled of mouthwash. Jessica said a few days earlier Larry had choked E.J. until the child stopped crying and passed out. She did not call police because she thought Larry would hit her if she did.

Larry was arrested on charges of domestic violence and child cruelty. While in jail that evening, he telephoned Jessica 25 times. He and Jessica discussed the incident of domestic abuse, Larry's temper, his history of abusing other women, Jessica's abusive former boyfriend, and how Larry's behaviors had frightened Jessica. She said every time she cried the Listerine he threw on her eyelashes made her eyes burn. Jessica and Larry made plans to drop the charges and discussed what they would tell the Agency.

Jessica told the social worker that she and Larry had had a verbal argument, not a physical one. She had been pressured to report physical abuse by her family, who wanted her to move out of the home she shared with her sister (Aunt) or break up with Larry. When asked about her assertion Larry poured Listerine on her head, Jessica said the cap

was not on tightly and the bottle fell off the dresser. She said she lied to Aunt about the Listerine.

In assessing the risk to E.J. in Jessica's care, the social worker interviewed family members. E.J.'s maternal grandmother said Jessica was very rough with E.J., describing her care as "not overly violent but overly rough."

Aunt said she saw Jessica put a blanket in E.J.'s mouth and mistreat him in other ways, including shaking him. Aunt saw Larry slap E.J.'s mouth when he was crying. Both parents were impatient with E.J., but Jessica lost her patience with him more often than Larry did. Their discipline methods were harsh and included "popping" E.J. on his hand or "upside the head." Aunt said the day after the incident, Jessica telephoned her and asked her to tell the Agency that Jessica had fabricated the statements about Larry.

The maternal great-grandmother said Jessica had not properly cared for E.J. since his birth. Jessica could not handle the baby's crying. The great-grandmother saw Jessica throw E.J.'s car seat on the ground with him in it. When the great-grandmother objected to her parenting, Jessica responded, "You can't tell me how to raise my son." Great-grandmother said Larry was abusive and controlling and Jessica's previous boyfriend had been very physically abusive.

E.J. was a happy, social child who enjoyed being around people and was meeting developmental milestones. His immunizations were up to date. He sang, danced, and knew a lot of words. Aunt, grandmother, and great-grandmother asked to visit E.J., but Jessica refused to allow her family members to have any contact with him.

On July 24, Jessica told the social worker that Larry lost his temper for "a very temporary moment" and it would not happen again.

At the jurisdictional hearing, Jessica testified that Larry did not hit her. She splashed mouthwash in her eyes by her own doing. She never saw Larry put his hands over E.J.'s mouth. Jessica denied ever placing anything over E.J.'s head. Her mother had telephoned the police. Jessica said she had lied to the police because Aunt threatened to call child protective services if she refused to speak to them.

The juvenile court found that Jessica had no insight into the events that led to E.J.'s dependency proceedings. Jessica's consistent statements to police officers and family members were a far more credible explanation of the events than was her testimony. The court sustained the jurisdictional allegations, removed E.J. from the parents' care, and ordered a plan of family reunification services. Jessica's and Larry's case plans required them to complete a domestic violence program and parenting education.

At the six-month review hearing, the social worker reported that E.J. was developmentally advanced for his age and able to communicate his needs. He was emotionally stable and very personable. Jessica and Larry were resistant to entering treatment programs or meeting with the social worker on a regular basis. Jessica started attending programs shortly before the six-month review hearing. She did not believe she needed treatment. Jessica denied she was a victim of domestic violence. She and Larry were planning to marry. The social worker said the risk was too high to allow the parents

to have unsupervised visitation with E.J. The parents remained angry at the Agency for "removing their child for no reason."

The juvenile court found by clear and convincing evidence that reasonable services had been provided to the parents, that returning E.J. to his parents' custody would be detrimental to him, and that the parents had failed to regularly participate and make substantive progress in their court-ordered treatment plans. The court terminated reunification services and set a section 366.26 hearing to select and implement a permanency plan for E.J.

Over the parents' objections, the court approved E.J.'s placement with Aunt (and Uncle). E.J. was bonded to Aunt, who had known E.J. all his life and had maintained regular weekly visits with him during his dependency case.

In reports prepared for the section 366.26 hearing, the social worker said E.J. was happy and healthy, with some sleeping problems. He was living with Aunt and Uncle, their two-year-old son, and Uncle's sister. Aunt and Uncle wanted to adopt E.J. and would allow his parents to maintain contact with him.

According to the social worker, Jessica regularly visited E.J. She had an established relationship with E.J. and her parenting skills appeared to be good. She was affectionate with him, brought healthy snacks, and used techniques to enhance his learning. She stopped E.J. from having a tantrum by rubbing his back and chest. When Jessica told E.J. she had to go to work, he said, "No, no, no." She said she loved him. E.J. said, "I love you."

The social worker said Jessica continued to deny Larry had abused her or E.J. Jessica did not understand the dynamics of the power and control Larry exerted over her. For example, Jessica deferred to Larry's decision not to attend the Child Family Team meeting to discuss E.J.'s well-being. She was discharged from her domestic violence victim support group because she was disruptive and argumentative and would not address safety and protection issues. When the social worker asked Jessica why E.J. was placed in protective custody, Jessica replied, "I honestly don't know. I was accused of putting something in [E.J.]'s mouth. And that Larry and I had an incident. But it was blown out of proportion." She denied Larry had ever covered E.J.'s mouth and caused him to pass out. The social worker did not believe Jessica would protect E.J. from domestic violence.

The social worker reported that Larry was loving, caring, and patient in his interactions with E.J., who appeared to have some attachment to his father. Larry cancelled a number of visits with E.J. and the visitation program closed his case in late August. Larry did not participate in any services and did not mitigate the risk to E.J. in his care.

On September 13, 2018, Larry filed a section 388 petition asking the court to reinstate his reunification services. He asserted that he and E.J. were extremely attached and that visitation was positive. He engaged in services on his own and was participating in a parenting class. His petition included documents verifying his recent enrollment in domestic violence and parenting programs.

Jessica filed a section 388 petition on September 14 asking the court to return E.J. to her custody. She asserted that she continued to participate in domestic violence services for a time after reunification services were terminated and then transitioned to church counseling. She regularly visited E.J., and claimed it was in the child's best interests to be raised by his mother in a safe and stable home.

On October 4, 2018, the juvenile court held contested hearings on the parents' section 388 petitions, followed by the contested 366.26 hearing. E.J.'s former foster mother said she was E.J.'s daycare provider and had known Jessica for three years. Jessica had matured. She always took good care of E.J. He was happy, neat, and well fed. Larry was always loving and caring with E.J. E.J. would run to his father saying, "Daddy Daddy Daddy." E.J. sometimes said he missed Daddy and Mama.

Jessica testified she continued to pay for domestic violence counseling and parenting education and then transitioned to services provided by her church. She and Larry were in a relationship. They hoped to live together with E.J. as a family again. Larry was a good father. Jessica denied Larry had choked and hit her. She denied he had thrown mouthwash on her. She denied he had ever abused E.J. Jessica explained that she and Larry had had a verbal argument and it was blown out of proportion.

Jessica said her visits with E.J. were good. At every visit, he came to her and gave her a big hug and a kiss. If he was sleepy, he would not let her put him down. If they were sitting on the floor, he would come and sit in her lap. When it was time to go, she would get down to his level, look him in the face, and say, "Mommy has to go to work."

She would wait until the foster parents arrived to pick him up. When his attention was redirected, she would leave quietly so he would not be upset.

In ruling on Jessica's petition to return E.J. to her care, the juvenile court found that for approximately 24 hours after the incident. Jessica's statements to two police officers and family members were remarkably consistent. Her subsequent recantations were not credible. She made no progress with services. The court said the sustained allegations were "as serious as they come." As long as there were unresolved issues concerning father's violent acts, the court was compelled to deny the relief requested. Pastoral counseling was not enough to resolve the issue whether Jessica could protect E.J. in view of the serious child abuse charges and the father's unresolved issues. The court concluded Jessica did not make a sufficient showing that she now possessed either the insight or the ability and capacity to make a safety plan and protect E.J. As a result, a return to her care was not in E.J.'s best interest.

The court admitted Larry's reports into evidence as well as the reports that had been admitted in evidence on Jessica's behalf. After listening to argument, it again noted the seriousness of the incident and stated it could not find that Larry had met his burden to show changed circumstances. Accordingly, the court denied his petition to reinstate reunification services.

Moving to the issues under section 366.26, the court found by clear and convincing evidence that E.J. was likely to be adopted if parental rights were terminated. He was currently placed with relatives who wanted to adopt him. The court acknowledged that Jessica had maintained regular contact and visitation with E.J. Their

interactions were appropriate and joyful, but her relationship with her son was not parental in nature. With the exception of the last few months, Larry had also maintained regular and consistent contact with E.J., and their visits were also described as appropriate and joyful. Nevertheless, any continuing contact with his parents was greatly outweighed by E.J.'s need for the stability of adoption. The court found that adoption was in E.J.'s best interest and terminated parental rights.

DISCUSSION

A. *Petitions to Modify Under Section 388*

Under section 388, a parent, interested person, or the dependent child may petition the court to change, modify, or set aside a previous order on the grounds of changed circumstances or new evidence. (§ 388, subd. (a).) The petitioner has the burden to show a change of circumstances or new evidence, and that the proposed modification is in the child's best interests. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415; Cal. Rules of Court, rule 5.570(e).)

In evaluating whether the petitioner has carried the burden to show changed circumstances, the juvenile court should consider a number of factors, including: "(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532, 531.)

We review the grant or denial of a petition for modification under section 388 for an abuse of discretion. (*In re Shirley K.* (2006) 140 Cal.App.4th 65, 71; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

1. Jessica did not meet her burden to show the court erred in denying her petition to return E.J. to her care.

Jessica contends the juvenile court abused its discretion in denying her request for custody of E.J. She asserts she established a change in circumstances and it was in E.J.'s best interests to be returned to her care. Jessica argues she proved she had substantially ameliorated the issues that necessitated E.J.'s placement in out-of-home care—domestic violence and child abuse—by meeting her treatment goals through pastoral counseling. She contends there were no incidents of domestic violence between her and Larry other than the one that occurred on July 20, 2017. Jessica further argues she proved E.J.'s return to her care was in his best interests because he was bonded to her and their visits were good.

In arguing she proved she had ameliorated the underlying issues of domestic violence and child abuse, Jessica takes a position on appeal that she rejected at the section 388 hearing—that the abusive incidents had in fact occurred. To the extent the argument has not been waived on appeal, the record shows that at the section 388 hearing, and throughout the dependency proceedings, Jessica denied there was any incident of domestic violence between her and Larry or that either parent mistreated E.J. At the hearing, Jessica did not argue she had mitigated the risk to E.J. caused by Larry's abuse of her and E.J. Instead, she argued the court should return E.J. to her care because she made progress in pastoral counseling "in what she feels the issues are;" understood the

dynamics of domestic violence; had a support system through her church; maintained employment and had her own apartment; she and Larry had improved their communication and had resolved their anger issues; and she had matured and was able to provide a safe and stable home for E.J. None of these factors, even if true, were sufficient to mitigate the risk to a young child from a father who had impeded the child's breathing to the point the child "passed out" and had choked the mother until she lost consciousness. The magnitude of the risk of harm to the child was compounded by the mother's insistence, despite clear and convincing evidence to the contrary, that such events never occurred.

Under section 388, subdivision (a), the focus of a petition for modification is on whether the petitioner has shown a legitimate change of circumstances. The court could reasonably conclude Jessica did not make the required showing. Jessica was discharged from a domestic violence treatment program because she was disruptive, refused to address safety and protection issues, and continued to deny any domestic violence. She then turned to her pastor for counseling "in what *she feels* the issues are." (Emphasis added.) She related what she had learned about the dynamics of domestic violence to a previous abuse relationship while continuing to deny that Larry had choked and hit her and injured her eyes. She denied he had ever abused E.J. Contrary to her argument, Jessica did not establish changed circumstances or even changing circumstances at the hearing. The record fully supports the finding the risk to the child had not been mitigated and it was not in his best interests to be returned to Jessica's care. (*In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 532.)

2. Larry did not meet his burden to show the court erred in denying his petition for additional reunification services.

Larry argues the juvenile court erred in denying his petition for an additional period of reunification services in view of the court's findings that he and Jessica were in an ongoing relationship with no further incidents of domestic violence, that his enrollment in domestic violence treatment was a positive step and he appeared to be "very motivated," and that he regularly visited his son until the "last three or four months." He contends those favorable developments constitute a legitimate change in his circumstances. Larry argues it was in E.J.'s best interest to grant him additional reunification services because they had a wonderful relationship.

The record reveals that Larry was resistant to participating in court-ordered domestic violence and parenting program. He did not meet with the social worker or participate in reunification services during the reunification period. Although he was at one time regularly visiting E.J., during a visit in June 2018 Larry admitted he had not seen his son in two months. Larry cancelled his visits with E.J. in July and August and the visitation center closed his case. Shortly before he filed his section 388 petition, Larry enrolled in online domestic violence and parenting programs. However, the mere fact of enrollment does not demonstrate changed circumstances. In view of the seriousness of the problem which led to the dependency, and Larry's refusal to participate in services or take any responsibility for his child's placement in out-of-home care, we conclude the court did not err in denying his petition to resume reunification efforts. (*In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 532.)

B. *Termination of Parental Rights Under Section 366.26*

1. Legal principles and standard of review

To provide stable, permanent homes for dependent children, section 366.26, subdivision (b) requires the juvenile court to select a permanency plan for a child. (§ 366.26, subd. (b).) (*In re Maria Q.* (2018) 28 Cal.App.5th 577, 593-594.) If a child is adoptable, as E.J. is, there is a strong preference for adoption over the alternative permanency plans. (*San Diego County Dept. of Social Services v. Superior Court* (1996) 13 Cal.4th 882, 888.) If the court determines that a child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1). (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1345.)

An exception to termination of parental rights applies where "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) "Evidence of 'frequent and loving contact' is not sufficient to establish the existence of a beneficial parental relationship." (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1315-1316.) " '[B]enefit from continuing the . . . relationship' " means the parent-child relationship "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.*, (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*)). "If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child

would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Ibid.*)

"We apply the substantial evidence standard of review to the factual issue of the existence of a beneficial parental relationship, and the abuse of discretion standard to the determination of whether there is a compelling reason for finding that termination would be detrimental to the child." (*In re Anthony B.* (2015) 239 Cal.App.4th 389, 395.)

2. The court did not err in declining to apply the beneficial parent/child relationship exception to termination of parental rights.

Jessica contends the juvenile court erred when it determined the beneficial parent-child relationship exception did not apply.² She argues the evidence clearly showed she and E.J. shared a strong parent/child relationship. In support of her argument, Jessica cites the many positive reported interactions she had with E.J. She asserts the undisputed evidence shows she regularly visited her son, demonstrated a parental role with him, responded appropriately to his needs, and that he was bonded with her.

The juvenile court found that Jessica regularly visited E.J., but her relationship with him was not parental in nature. A judgment will be upheld if it is supported by substantial evidence, even though substantial evidence to the contrary also exists and the trial court might have reached a different result had it believed other evidence. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 230.) The record shows that Jessica and E.J. had a loving relationship. During visitation, her parenting skills with him were good, and she was able to meet his needs for comfort, nourishment, affection and safety in his physical

² Larry joins in Jessica's argument. Because Larry does not appeal the termination of his parental rights on the ground that *he* had a beneficial parent/child relationship with E.J., we limit our discussion to the relationship between Jessica and E.J.

environment. However, the record clearly shows Jessica did not meet, and was not likely to be able to meet, her primary parental obligation to protect E.J. from physical and emotional harm. Thus, the court could reasonably conclude that Jessica's relationship to E.J. was not parental in nature.

In addition, Jessica does not show the court abused its discretion in determining, to the extent E.J. derived some benefit from his relationship with Jessica, that the continuation of the parent/child relationship did not promote his well-being to such a degree as to outweigh the well-being he would gain from adoption. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Although Jessica had a loving relationship with E.J., she put her own desire to protect Larry and their relationship ahead of her son's needs for a safe, stable, and secure home. E.J. is three years old. He requires parents who are dedicated to protecting him and ensuring his well-being, no matter the cost to their needs or their pride. The record clearly shows Jessica was unwilling to take reasonable steps necessary to protect her son from physical and emotional abuse.

We conclude that the juvenile court did not err in determining that E.J. would greatly benefit from the security of a stable, permanent home with committed, capable adoptive parents. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Thus, the record supports the finding E.J. will not be greatly harmed by termination of parental rights. (§ 366.26, subd. (c)(1)(B)(i); *Autumn H.*, at p. 575.)

DISPOSITION

The findings and orders are affirmed.

DATO, J.

WE CONCUR:

O'ROURKE, Acting P. J.

GUERRERO, J.